MAY 20 1955
HAROLD B. WILLEY, C

No. [redacted] 89

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

INTERNATIONAL ASSOCIATION OF MACHINISTS, ET AL.,
Petitioners

v.

AL FRIEDMAN, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CLARENCE M. MULHOLLAND
EDWARD J. HICKEY, JR.
JAMES L. HIGGINS, JR.
620 Tower Building
Washington 5, D. C.
Counsel for Petitioners

Of Counsel:
MULHOLLAND, ROBB & HICKEY
620 Tower Building
Washington 5, D. C.

May 20, 1955

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement	3-6
Reasons for Granting the Writ	6-17
Conclusion	18
Appendix A—Statutes	1a-5a
Appendix B—Opinions and Judgment Below	6a-11a

CITATIONS

CASES:

Dermody v. *Smith*, 83 F. Supp. 620 (N.D. Ind. 1949) 12
Dewar v. *Brooks*, 16 F. Supp. 636 (D.C. Nev. 1936) .. 12
Eccles v. *People's Bank*, 333 U.S. 426 (1948) 8, 9, 17
Electro Therapy Products Corp. v. *Strong*, 84 F. 2d 766 (C.A. 9, 1936) 7
Food Fair Stores Inc. v. *Food Fair Inc.*, 177 F. 2d 177 (C.A. 1, 1949) 13
Friedman v. *International Association of Machinists*, (Civil Action No. 3367-52, U.S. D.C. D.C.) 3
Gibbs v. *Buck*, 307 U.S. 66 (1939) 8
Giordano v. *Radio Corporation of America*, 183 F. 2d 558 (C.A. 3, 1950) 7, 10, 11
Healy v. *Ratta*, 292 U.S. 263 (1934) 6, 10, 15
International Longshoremen's and Warehousemen's Union v. *Boyd*, 347 U.S. 222 (1954) 8, 17
Johnson v. *Interstate Transit Lines*, 163 F. 2d 125 (C.A. 10, 1947) 9

Page

Klepinger v. *Rhodes*, 140 F. 2d 697 (C.A. D.C. 1944), *cert. den.* 322 U.S. 734 8
Kuos v. *Associated Press*, 299 U.S. 269 (1936) 7, 8
Land v. *Dollar*, 330 U.S. 731 (1947) 8
Larson v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949) 8
Local No. 7 B.M.P.I.U. v. *Bowen*, 278 F. 271 (D.C. Tx. 1922) 7
McNutt v. *General Motors Acceptance Corp.*, 298 U.S. 178 (1936) 6
National Labor Relations Board v. *Kingston Cake Co.*, 206 F. 2d 604 (C.A. 3, 1953) 6, 15
National War Labor Board v. *Montgomery Ward & Co.*, 144 F. 2d 528 (C.A. D.C., 1944), *cert. den.* 323 U.S. 774 (1944) 8
North Pacific S. S. Co. v. *Soley*, 257 U.S. 216 (1921) 7
Public Service Commission of Utah v. *Wycoff*, 344 U.S. 237 (1952) 8, 17
Radio Officers' Union of the Commercial Telegraphers Union v. *National Labor Relations Board*, 347 U.S. 17 (1954) 13, 14
San Francisco Lodge No. 68 of International Association of Machinists v. *Forrestal*, 58 F. Supp. 466 (N.D. Cal. 1944) 9
Seslar v. *Union Local 901 Inc.*, 186 F. 2d 403 (C.A. 7, 1951) 12
Taylor v. *Brotherhood of Railway and Steamship Clerks*, 106 F. Supp. 438 (D.C. D.C. 1952) 9
United States v. *General Motors Corporation*, 323 U.S. 373 (1945) 8
Union Starch & Refining Co. v. *National Labor Relations Board*, 186 F. 2d 1008 (C.A. 7, 1951), *cert. den.* 342 U.S. 815 15
Vicksburg, S. & P. R. R. Co. v. *Nattin*, 58 F. 2d 979 (C.A. 5, 1932) 13, 16, 17

Page

STATUTES:

Judiciary Act of 1789, 1 Stat. 78, section 11, as amended by 24 Stat. 552, section 1; 25 Stat. 443, section 1, 36 Stat. 1091, section 24 6
Act of June 25, 1948, c. 646, 62 Stat. 930, 28 U.S.C.A. 1331, 1332 .....3, 4, 1a
District of Columbia Code, 146 Edition—Title 28, section 41 .....3, 2a
District of Columbia Code, 1951 Edition—Title II, sections 305, 306, 755 (a) 3, 4, 1a, 2a
Labor Management Relations Act of 1947, Act of June 23, 1947, 61 Stat. 140, as amended 65 Stat. 601, 29 U.S.C.A. 158 (a) (3); 158 (b) (2); 160 (a); 160 (c); 160 (e) 5, 9, 12, 13, 3a, 4a, 5a

MISCELLANEOUS:

30 ALR 2d 614, 615, Annotation, Jurisdictional Amount 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No.

INTERNATIONAL ASSOCIATION OF MACHINISTS, ET AL.,
Petitioners

v.

AL FRIEDMAN, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on February 17, 1955.

OPINIONS BELOW

The oral opinion of the District Court (R. 44) is unreported and is printed in Appendix B hereto, *infra*, p. 6a. The order of the District Court (R. 45) is unreported and is printed in Appendix B hereto, *infra*, p. 6a. The opinion

of the Court of Appeals (R. 48-52) is unreported and is printed in Appendix B hereto, *infra*, pp. 7a-10a.

JURISDICTION

The Judgment of the Court of Appeals was entered on February 17, 1955, (R. 53); Appendix B, *infra*, p. 11a. Rehearing was denied on March 11, 1955. (R. 57). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTION PRESENTED

In a suit in a Federal District Court by an expelled member of a labor union to restore union membership, where the requisite jurisdictional amount is dependent upon an anticipated loss of employment, is the jurisdictional requirement satisfied by a finding that there is a "present probability" of loss of employment where the anticipated discharge from employment is contingent upon a series of speculative events and completely uncertain of occurrence, where it is conceded that no threat of discharge has been made, and where if such discharge did in fact occur it would constitute an unfair labor practice under the Labor Management Relations Act requiring the employee's reinstatement?

STATUTES INVOLVED

The statutory provisions involved are sections 1331 and 1332 of the Judicial Code, 62 Stat. 930, 28 U.S.C., section 1331 and 1332; Title 28, section 41 of the District of Columbia Code (1940 edition); sections 11-305; 11-306; and 11-755 (a) of the District of Columbia Code (1951 edition); and sections 8 (a) (3), 8 (b) (2), 10 (a), 10 (c) and 10 (e) of the Labor Management Relations Act of 1947, 61 Stat. 140, as amended, 65 Stat. 601, 29 U.S.C.A. 158 (a) (3), 158 (b) (2), 160 (a), 160 (c) and 160 (e). These provisions are printed in Appendix A, *infra*, pp. 1a-5a.

STATEMENT

The respondent was found guilty on September 16, 1952, by a vote of the Convention of the petitioner International Association of Machinists (International Association) of membership in the Communist Party and advocacy, encouragement and support of Communism in violation of the laws of the Association and was expelled from membership therein. (R. 4, 15, 20)[1] Thereafter, the respondent on October 7, 1952, brought suit in the Federal District Court for the District of Columbia against the International Association and the individual petitioners seeking reinstatement of his membership in the union. (R. 1-6).[2] The complaint alleged that respondent's membership in the International Association was a property right exceeding the sum of $3,000.00 in value. (R. 5).

The petitioners moved the District Court to dismiss the action on the ground that the Court lacked jurisdiction over the subject matter because the complaint failed to allege facts sufficient to establish that the matter in controversy exceeded the sum or value of $3,000.00, and that, in fact, the amount involved did not reach this sum. (R. 7). The motion was supported by affidavit. (R. 8-10). The Court after a hearing on the motion held that whether the respondent proceeded under the general Federal

[1] This action of the Convention was the culmination of a full hearing within the International Association beginning with a trial before respondent's local Lodge 688. This trial resulted in a not guilty verdict for respondent which was sustained by the vote of the local Lodge. (R. 3, 14, 19). Upon appeal the president of the International Association found respondent guilty upon the record. (R. 3, 14, 19). Respondent appealed this decision to the Executive Council of the International Association which sustained the verdict. (R. 3, 14, 15, 19, 20). An appeal to the Convention followed.

[2] Respondent filed a prior suit asking such relief from the District Court on July 31, 1952, following the action of the Executive Council of the International Association. This suit was dismissed because respondent had not exhausted his remedies within the organization. *Friedman* v. *International Association of Machinsts, et al.* (Civil Action No. 3367-52, U.S.D.C. D.C.).

statute (28 U.S.C.A. 1332 (a) (1) (b)) or invoked the jurisdiction of the District Court in its local character (Title II, Sec. 306 of the District of Columbia Code, 1951 edition), the burden of showing that the matter in controversy was in excess of the sum or value of $3,000.00 applied in either case and must be resolved by the taking of testimony. (R. 11, 12). The Court also directed the respondent to make his election of the statute under which he desired to proceed. (R. 12).

An amended complaint in two counts was filed on April 23, 1954, each of which set forth the same allegations of fact and requested the same relief. The first invoked the jurisdiction of the Court under the local statute (R. 13) and the second invoked the general Federal jurisdiction of the District Court. (R. 18). Count I alleged that respondent's membership in the International Association is a valuable property right. (R. 16). Count II alleged that such membership is a valuable property right which exceeds the sum of $3,000.00 in value. (R. 21). Thereafter, respondent elected to proceed under the local jurisdiction of the District Court as provided in Title II, Section 306 of the District of Columbia Code (1951 edition). (R. 23).

Testimony was then taken at the direction of the District Court on the issue of the jurisdictional amount. (R. 24-44). The record of this testimony showed that respondent's principal assertion of injury growing out of his expulsion from the International Association was his claim of possible discharge from employment by his employer, the Anheuser-Busch Company, because of a union shop agreement between the International Association and the employer under which employees of the company who are not members of the International Association must, with certain limitations, join the union. (R. 16, 17, 22, 25, 26, 29, 36). It was asserted that such discharge would result in loss of earnings and other benefits connected with the

employment. (R. 25, 26).[3] However, respondent conceded that he knew of no attempt to have him discharged from his employment at Anheuser-Busch. (R. 35-40). Upon such a showing, the District Court dismissed the complaint for lack of jurisdiction. (R. 44, 45, Appendix B, p. 6a). The Court pointed out that this did not mean that respondent was cut off from any relief. He had simply chosen the wrong forum. (R. 44, Appendix B, p. 6a). Upon appeal the Court of Appeals reversed the decision of the District Court and remanded the case for trial on such justiciable questions between the parties as are raised by the pleadings. (R. 48-52). The Court concluded that damages in excess of $3,000.00 would be reasonably certain to result from respondent's expulsion from union membership in the form of loss of employment. (R. 51, 52). The Court recognized that it is an unfair labor practice under the Labor Management Relations Act of 1947 for an employer to discharge or for a union to seek the discharge from employment of an employee for non-membership in the union for reasons other than failure to tender dues and initiation fees. (R. 51). In spite of this recognition, the Court of Appeals concluded that the probabilities of retention of his job are against respondent unless he keeps his union membership "for the courts might not compel reinstatement of an employee discharged after expulsion from a union for conduct such as is attributed to

[3] The respondent also claimed the loss of union death benefits as a result of his expulsion from union membership. (R. 16, 21, 31). However, the record shows the value of these benefits to respondent to be only $125.00. (R. 9). Respondent further claimed the loss of strike benefits if his expulsion stood. (R. 17, 22, 31). The record shows that receipt of strike benefits from the International Association is not a matter of right of any member but is within the discretion and determination of the International President and Executive Council, is dependent upon the availability of funds for such purposes, is subject to further contingencies and conditions set forth in the Association's Constitution, and in no event can be paid unless a strike goes over two weeks. (R. 9). Such a claim is obviously too contingent to be included in determining the value of the right in controversy.

appellant." (R. 51). In support of this conclusion the Court cited *National Labor Relations Board* v. *Kingston Cake Co.*, 206 F. 2d 604 (C.A. 3, 1953). (R. 51). The Court also thought that job insecurity would attach to the likelihood of respondent's presence in his place of employment becoming a source of friction. (R. 51).

On March 11, 1955, the Court of Appeals denied petitioners' timely filed petition for rehearing. (R. 57).

REASONS FOR GRANTING WRIT

1. The present petition raises a jurisdictional issue in a new form that is important in its potential impact upon the administration of the Federal court system.

One of the essential elements of jurisdiction of the Federal courts over a given case is the value of the subject matter in litigation. The limitations which have been placed by Congress on this aspect of Federal jurisdiction are obviously of the greatest importance in keeping within bounds the case load of the Federal court system since otherwise their jurisdiction would be almost as wide as the field of Federal law itself. The importance attached by Congress to these limitations is shown by the fact that they were included in the first Judiciary Act of 1789,[4] and the prerequisite amounts have twice been increased.[5] It is in recognition of this fact that this Court has laid down the rule that the statutory jurisdictional requirements as to the amount in controversy should be strictly construed against assumption of jurisdiction by the Federal courts. *McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178 (1936); *Healy* v. *Ratta*, 292 U.S. 263 (1934). The importance of the limitation is further demonstrated by the universally recognized rule that there is a duty upon a Federal court to be watchful of the question of jurisdictional amount, and to ascertain by any lawful method,

---

[4] 1 Stat. 78, section 11.

[5] 24 Stat. 552, section 1; 25 Stat. 443, section 1; 36 Stat. 1091, section 24.

at any stage of the proceeding, the existence of the requisite amount or value in controversy, whether or not the parties have raised the issue. *KVOS* v. *Associated Press*, 299 U.S. 269 (1936); *North Pacific S. S. Co.* v. *Soley*, 257 U.S. 216 (1921); *Electro Therapy Products Corp.* v. *Strong*, 84 F. 2d 766 (C.A. 9, 1936); 30 ALR 2d 614, 615, Annotation, Jurisdictional Amount.

The present case brings to the fore an entirely new and novel problem in application of this important jurisdictional requirement which should be decided by this Court. Suits for the reinstatement of union members expelled from membership in a labor organization have been frequent in state courts. Only a handful of these suits have ever been brought in Federal courts and the jurisdictional requirements as to the amount in controversy in such cases appear to have been met on the basis solely of a class action. *Local No. 7 B.M.P.I.U.* v. *Bowen*, 278 F. 271 (D.C. Tex., 1922). Cf. *Giordano* v. *Radio Corporation of America*, 183 F. 2d 558 (C.A. 3, 1950). If these suits may be brought in Federal courts upon an individual basis and with the speculative showing of injury here involved, the already overburdened Federal court system will be required to assume the further burden of a whole new field of litigation in which the suits at best skirt the edges of the jurisdictional requirements. The speculative nature of the claims in this type of litigation is clearly demonstrated by the opinion below which, in order to sustain jurisdiction, had to ignore the rule of strict construction and strain to the utmost the "present probability" concept.

Nor is the impact of the decision below upon the Federal court system affected by the fact that the respondent elected to proceed under the local jurisdiction of the District Court (Title II, Sec. 306 of the District of Columbia Code, 1951 ed.), R. 23, rather than the general Federal statute. (28 U.S. C.A. 1332 (a) (1) (b)). Both the District Court (R. 12) and the Court of Appeals (R. 50) held that it made no difference on the jurisdictional issue whether

the suit is under the local or general statute since their requirements as to the amount in controversy are the same. *Klepinger* v. *Rhodes*, 140 F. 2d 697 (C.A.D.C. 1944); *cert. den*, 322 U.S. 734. (R. 49, Appendix B, 8a).

Finally the fact that this petition is presented to review a judgment below which refuses to dismiss a complaint is not determinative of the issue of whether the writ of certiorari should issue. This Court has considered cases in such a posture where there is an important and clear cut issue of law which is fundamental to the further conduct of the case. *United States* v. *General Motors Corporation*, 323 U.S. 373, 377 (1945). Cases which raise jurisdictional issues have been found by the Court to come within this principle. *Land* v. *Dollar*, 330 U.S. 731, 734 (1947); *Larson* v. *Domestic & Foreign Commerce Corporation*, 337 U.S. 682, 685 (1949). In particular this Court has reviewed and decided cases in the same procedural posture as the present case which raised the same issue that the Federal Courts lacked jurisdiction because the statutory requirements as to the amount in controversy had not been met. *Gibbs* v. *Buck*, 307 U.S. 66 (1939); *KVOS Inc.* v. *Associated Press*, 299 U.S. 269 (1936). The present petition meets the tests of the cited cases.

2. The decision of the Court of Appeals is believed to be contrary to and in conflict with the decisions of this court which hold that claims resting upon a speculative anticipation of a future course of action which may never occur, and not upon a present actual factual basis, are too remote to warrant the exercise of the judicial function and are non-justiciable. *International Longshoremen's and Warehousemen's Union* v. *Boyd*, 347 U.S. 222 (1954); *Public Service Commission of Utah* v. *Wycoff*, 344 U.S. 237 (1952); *Eccles* v. *Peoples Bank*, 333 U.S. 426 (1948); *National War Labor Board* v. *Montgomery Ward & Co.*, 144 F. 2d 528 (C.A.D.C. 1944), *cert. den.* 323 U.S. 774 (1944). In the *Eccles* case, this Court expressed its clear view that Federal courts should not indulge in speculative anticipation as follows:

(p. 432)

> "Thus the Bank seeks a declaration of its rights *if* it should lose its independence, or *if* the Board of Governors should reverse its policy and seek to invoke the condition even though the bank remains independent and *if* then the Directors of the Federal Deposit Insurance Corporation should not change their policy not to grant deposit insurance to the Bank as a non-member of the Federal Reserve System. The concurrence of these contingent events, necessary for injury to be realized, is too speculative to warrant anticipatory judicial determinations."

The present case is squarely covered by these holdings. Had the suit been one by respondent for declaratory relief against the Anheuser-Busch Company and petitioners, or for an injunction against the company and petitioners in order to prevent an anticipatory loss of employment because of expulsion from the International Association, there can be no doubt that Federal courts would have promptly dismissed such a suit on the basis of the cited decisions as asking for relief grounded on a purely speculative injury.[6] Yet it was necessary for the Court of Appeals to indulge in identically the same speculation with respect to respondent's future employment in order to find jurisdiction in the District Court to entertain the present suit. The injury necessary to sustain jurisdiction could result only *if* the union sought respondent's discharge in violation of the National Labor Relations Act of 1947, *infra*, p. 13, *if* the employer heeded such a request and did discharge respondent in violation of such act, and *if* upon application to the National Labor Relations Board for reinstatement the requirements of the statute were not complied with by the Board and the Courts. This is just such a series

---

[6] *Johnson* v. *Interstate Transit Lines*, 163 F. 2d 125, 128-129 (C.A. 10, 1947); *Taylor* v. *Brotherhood of Ry. & Steamship Clerks, etc.*, 106 F. Supp. 438, 442-444 (D.C.D.C. 1952); *San Francisco Lodge No. 68 of International Association of Machinists* v. *Forrestal*, 58 F. Supp. 466, 468 (N.D. Cal., 1944).

of contingencies as this Court found in the *Eccles* case to be beyond the scope of judicial inquiry.

The "justiciable issue" cases and cases of the present type present merely different aspects of the same jurisdictional problem, i.e., the certainty or lack of certainty of injury. There should be complete harmony of treatment and result in both situations. Otherwise, the respondent is able to slip in the back door of the District Court when he could not enter the front.

Moreover, the decision below is clearly contrary to the rule laid down by this Court in *Healy* v. *Ratta*, 292 U.S. 263 (1934), requiring that the statutory jurisdictional requirements as to the amount in controversy should be strictly construed against assumption of jurisdiction by Federal courts. The rationale of this requirement was stated by Justice Stone as follows: (p. 270)

> "Pursuant to this policy the jurisdiction of the Federal courts of first instance has been narrowed by successive acts of Congress, which have progressively increased the jurisdictional amount. The policy of the statute calls for its strict construction . . . Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute defined * * *."

In this case the Court of Appeals obviously went to the other extreme and resolved every future contingency and doubt in favor of jurisdiction. The necessity for the violation of this Court's declared rule did not exist as the District Court, in dismissing the complaint, pointed out that this did not mean that the respondent was cut off from any judicial relief. (R. 44).

3. The decision of the Court below is also believed to be in conflict with the decision of the Third Circuit in *Giordano* v. *Radio Corporation of America*, 183 F. 2d 558 (C.A. 3, 1950), involving the same issue. In that case the plaintiff alleged that he was about to be expelled from the

union of which he was a member and his name withdrawn from the membership list. The District Court there involved found that the amount in controversy exceeded $3,000.00 on the basis that plaintiff was suing as a representative of a class of 15 other individuals who likewise were about to be expelled from the union. The Third Circuit found that there was no proper class suit and that the jurisdictional issue must be considered solely on the basis of an action to vindicate plaintiff's individual right. On such basis the Court found that the requisite jurisdictional amount was not present. On this point the Court declared: (p. 561)

> "The district judge in his oral opinion denying the defendant's motion to dismiss the complaint did say that if no proper class action was alleged he was of the opinion that 'the rights and liabilities of Giordano alone exceed the sum of $3,000.00.' But he made no formal finding to this effect and *we think that if he had done so we would have been compelled to set it aside as clearly erroneous.* For there is no basis in the evidence for concluding that the plaintiff will suffer pecuniary loss of as much as $3,000.00 as a result of his expulsion from Local 103. Although if expelled he will lose his top seniority with the defendant corporation it is not suggested by the evidence that his normal seniority will not be sufficient to enable him to retain his job in the future. Nor does it appear that he is receiving income from the Local which he will lose by his expulsion or that his interest as a member in the assets of the Local exceed $3,000.00."
>
> "The question of the existence of the jurisdictional amount was squarely raised by the motion to dismiss and the court, after considering the evidence presented to it, made a finding of fact on the point. That finding is asserted by the defendants to be erroneous. If construed as applicable to the plaintiff's individual claim we must hold that it is clearly so. For, as we have seen, the evidence wholly fails to establish the fact that the plaintiff is likely to suffer pecuniary loss in the sum of $3,000.00 as the result of his expulsion from the Local. The district court should,

therefore, have dismissed the complaint for want of jurisdictional amount in controversy. Accordingly upon remand that action will be directed. Since the interlocutory injunction must fall with the dismissal of the complaint it is not necessary for us to consider the defendant's contentions that it was erroneously granted."

"The order granting a preliminary injunction will be vacated and the cause will be remanded with directions to dismiss the complaint." (Emphasis supplied)

In the judgment below in this case the Court of Appeals held that there was a "present probability" of the respondent losing his job as a result of his expulsion from the petitioning International Association so that the amount in controversy would exceed $3,000.00. The Third Circuit on the other hand held in the *Giordano* case that a finding of a probable pecuniary loss in excess of $3,000.00 from loss of union membership would be "clearly erroneous." This Court should clarify the jurisdictional status of suits in Federal courts based on loss of union membership, particularly in the light of their relationship to the Labor Management Relations Act of 1947, *infra*, p. 13.

4. The decision of the Court of Appeals is erroneous and the decision of the District Court clearly correct.

It is generally recognized that the test of the jurisdictional amount in injunction cases is the value to the plaintiff of the right sought to be protected. *Seslar* v. *Union Local 901 Inc.*, 186 F. 2d 403 (C.A. 7, 1951), *cert. den.* 341 U.S. 940; *Dermody* v. *Smith*, 88 F. Supp. 620 (1949); *Dewar* v. *Brooks*, 16 F. Supp. 636 (1936). The alleged right which the respondent seeks to protect in this case is his union membership. The measure of value for that right put forward by the respondent is his earning capacity in his job since he asserts that without union membership he will lose his job and his earning capacity be greatly reduced. (R. 16, 17, 22, 26, 29, 36). But it is not

enough to merely assert the possibility of such a loss. There must at the very least be a reasonable certainty that the loss will occur. *Food Fair Stores Inc.* v. *Food Fair Inc.*, 177 F. 2d 177 (C.A. 1, 1949). *Vicksburg, S. & P. R. R. Co.* v. *Nattin*, 58 F. 2d 979 (C.A. 5, 1932). We believe that such a reasonable certainty cannot legally exist in the type of situation presented by this case.

The record shows that no attempt has been made by the union or by respondent's employer to discharge him because of his expulsion from membership in the union.[7] (R. 36). In addition, it is clear that any effort to do so would be unlawful under the Labor Management Relations Act of 1947 and that an adequate remedy exists within the National Labor Relations Board to enforce this requirement.

The Labor Management Relations Act of 1947 was designed, among other things to protect the rights of individual employees in their relations with labor organization. To this end the statute (29 U.S.C.A. 158 (a) (3)) made it an unfair labor practice for the employer to discharge an employee for non-membership in a union if he has reasonable grounds to believe, *inter alia*, that such membership was terminated for reasons other than the failure of the employee to tender the periodic dues required as a condition of retaining membership. (Appendix A, p. 3a). Likewise, the statute (29 U.S.C.A. 158 (b) (2)) makes it an unfair labor practice for a union to cause or attempt to cause an employer to discharge an employee in violation of subsection (a) (3) of section 158 for non-union membership where termination of that membership has been due to reasons other than failure to tender dues. In *Radio Officers' Union of the Commercial Telegraphers Union* v. *National Labor Relations Board*, 347 U.S. 17 (1954), this Court defined the scope and intent

[7] Indeed, there are no indications that up to the time of the filing of the present petition, nearly two years after respondent's expulsion from the International Association, anyone has ever suggested his discharge from employment for any reason.

of these statutory restrictions. The pertinent portion of this discussion reads as follows: (p. 40)

> "The policy of the Act is to insulate employees' jobs from their organizational rights. Thus §§ 8 (a) (3) and 8 (b) (2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood. The only limitations Congress has chosen to impose on this right is specified in the proviso to § 8 (a) (3) which authorizes employers to enter into certain union security contracts, but prohibits discharge under such contracts if membership "was not available to the employee on the same terms and conditions generally applicable to other members" or if "membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership." Lengthy legislative debate preceded the 1947 amendment to the Act which thus limited permissible employer discrimination. This legislative history clearly indicates that Congress intended to prevent utilization of union security agreements for any purpose other than to compel payment of union dues and fees. Thus Congress recognized the validity of unions' concern about "free riders," i.e., employees who receive the benefits of union representation but are unwilling to contribute their share of financial support to such union, and gave unions the power to contract to meet the problem while withholding from unions the power to cause the discharge of employees for any other reason. Thus an employer can discharge an employee for nonmembership in a union if the employer has entered a union security contract valid under the Act with such union, and if the other requirements of the proviso are met. No other discrimination aimed at encouraging employees to join, retain membership, or stay in good standing in a union is condoned."

It is thus crystal clear that respondent's employer could not discharge him because of his expulsion from the Inter-

national Association on the grounds here involved and the union could not cause his discharge without both the employer and the union being in violation of the cited provisions of the Labor Management Relations Act. Such action would lead to reinstatement of the employee with back pay. 29 U.S. C.A. 160 (a) and (c). *Union Starch and Refining Co.* v. *National Labor Relations Board,* 186 F. 2d 1008 (C.A. 7, 1951), *cert. den.* 342 U.S. 815.

The Court below recognized these requirements but nevertheless found a reasonable certainty of job loss because a Court of Appeals "might not" enforce a National Labor Relations Board order for reinstatement if there were a discharge in this case based on loss of union membership. (R. 51). We respectfully submit that, even if it could be assumed *arguendo* that a Court of Appeals might ignore its clear duty in such a case, this contingency does not, as a matter of law, establish the reasonable certainty necessary to find the required jurisdictional amount. A "might" is clearly no more than a "possibility" of future harm, which places the situation across the line and into the area of contingent or speculative future claims which have consistently been held insufficient for jurisdictional purposes. *Healy* v. *Ratta,* 292 U.S. 263 (1934); Cases Cited, *supra,* p. 8.

Nor is this simply a matter of semantics, for we believe it to be clear that there can be no more than a speculative possibility that the respondent will lose out in his employment as a result of his expulsion. As pointed out, *supra,* p. 9, it can occur only upon the happening of a whole series of contingencies. The speculative nature of the anticipated loss is underscored by the precedent on which the court below relied in order to reach its result, *National Labor Relations Board* v. *Kingston Cake Co.,* 206 F. 2d 604 (C.A. 3, 1953). (R. 51). This case in no way supports the proposition that in a situation like the present one a Court of Appeals "might not" order reinstatement of a wrongfully discharged employee. The employee in that

case was discharged at the behest of the union because he had tried to aid a rival organization to which he formerly belonged by not signing a non-Communist affidavit in order to keep the first union off an election ballot. The National Labor Relations Board ordered his reinstatement. The Third Circuit refused to enforce the order on the ground that to do so would defeat the basic policy of the statute to provide for collective bargaining through freely chosen representatives. It was a *sui generis* situation which bears no relationship to the present case. We can perceive no relevancy whatsoever of the *Kingston* case in determining the present probability of injury to respondent arising from his expulsion from the International Association.

The opinion below relies upon even more speculative possibilities when it concludes that job insecurity would attach to the likelihood of respondent's presence in his place of employment becoming a source of friction. (R. 51). This speculation clearly does not approach the degree of certainty required by precedent to give it the dignity of a valid consideration in establishing Federal jurisdiction. One can just as easily speculate that reinstatement of respondent in the International Association by Court order would be resented by his fellow employees and more likely lead to friction and job insecurity. The point is that so important a matter as Federal jurisdiction should not turn on what is essentially nothing more than a guess. The vice of this type of speculation in determining whether jurisdictional requirements are met was clearly spelled out by the Fifth Circuit in *Vicksburg, S. & P. R. Co.* v. *Nattin*, 58 F. 2d 979 (C.A. 5, 1932), as follows: (p. 980)

> "To meet the jurisdictional requirement of amount, the bill alleged that, in order to pay the interest and retire the bonds, plaintiff would be each year assessed such an amount as that it would in the aggregate, through the twenty-five years, be compelled to pay on account of the bonds a sum in excess of $5,000. The District Judge, conceiving that the amount in con-

troversy was only $406.80, dismissed the suit for want of jurisdiction.

"The District Judge was right.

* * * * *

"Only prophetic ken of a rare order could forecast what will ensue. Jurisdiction is based on actuality, not prophecy, the pressure of a grievance immediately felt and presently measurable in money of the jurisdictional amount. Speculative anticipation that conditions, from which present ills, not now sufficient in amount to give jurisdiction, flow, may in time aggregate the necessary amount, will not support jurisdiction."

The *Vicksburg* case represents the application to the jurisdictional problem arising out of statutory requirements as to the amount in controversy of those decisions of this Court which preclude jurisdiction based on anticipatory injuries as not giving rise to "justiciable issues." *International Longshoremen's and Warehousemen's Union* v. *Boyd*, 347 U.S. 222 (1954); *Public Service Commission of Utah* v. *Wycoff Co.*, 344 U.S. 237 (1952); *Eccles* v. *Peoples Bank*, 333 U.S. 426 (1948). Both problems are simply different sides of the same coin.

Here too only a "prophetic ken of a rare order" can forecast what will happen to respondent as a result of his expulsion from the International Association. If he fears the future then other proper forums are available to test the validity of the expulsion. No basis exists to burden the Federal courts with this kind of speculative grievance.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CLARENCE M. MULHOLLAND
EDWARD J. HICKEY, JR.
JAMES L. HIGHSAW, JR.
620 Tower Building
Washington 5, D. C.
Counsel for Petitioners

Of Counsel:

MULHOLLAND, ROBIE & HICKEY
620 Tower Building
Washington 5, D. C.

May 20, 1955